

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1321

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

B
p. 85

UNITED STATES OF AMERICA,

Appellee

v s

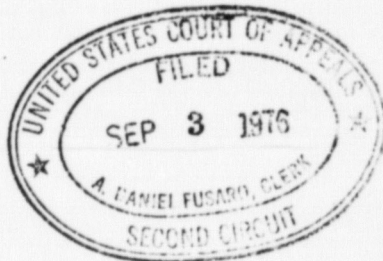
JEROME REYNOLDS and MELVIN JACKSON,

Appellants

Docket No. 76-1321

APPENDIX FOR APPELLANTS

BRIEF



ROCCO D. POTENZA
Attorney for Appellants
Office & P.O. Address
1100 Chemical Bank Building
Buffalo, New York 14202
Telephone: (716) 853-5300

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
for the
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UNITED STATES OF AMERICA,
Appellee

v s

JEROME REYNOLDS and MELVIN JACKSON,
Appellants

Docket No. 76-1321

APPENDIX FOR APPELLANTS
BRIEF

CR - 75 - 175 ~~John T. Curtin~~

JOHN T. ELFIN

TITLE OF CASE

ATTORNEYS

vs.

Roger Williams / AUSA

and knowingly, intentionally and unlawfully possess
with intent to distribute a substance containing
heroin, a Schedule I Controlled Substance, in vio.
title 21, U.S.C., Section 841(a)(1)

For Defendant:

Rocco Potenza, Esq. (Reynolds)
Michael Blotnik, Esq. (Jackson)
Rocco Potenza
100 Chemical Bank Bldg.
Buffalo, N.Y. 14202

Michael Blothnik
69 Delaware Avenue
Buffalo, NY 14202

1 Ct.

[illegible]

DATE	PROCEEDINGS
July 30	Filed Indictment
July 30	J.S. 2 made
Aug. 5	Proceedings before the Magistrate - Atty. Richard Weiss appeared for defts. (of counsel for Atty. Rocco Potenza). By consent, arraignments were adj. to 8/6/75
Aug. 6	Proceedings before the Magistrate - Atty. Rocco Potenza appeared for defts; Defts. enter pleas of not guilty. Discovery motions are to be filed by 8/18/75; the Govt. is to respond by 8/22/75 and argument is scheduled for 8/26/75; Defts continued on \$5,000 surety bond as previously set.
Aug. 19	Proceedings before Magistrate - No appearance for deft. Due to hospitaliz of defts atty, Rocco Potenza new discovery schedule was set; Filing motions 8-29-75 Govts response 9-5-75; argument of motions 9-9-75.

29	Filed Magistrates papers: complaint of violation for both deft's. filed surety bond in the amt. of \$5,000 for deft Jackson, and Reynolds.
9	Proceedings before the Magistrate - No appearance for defts.; Mr. Potenza has requested adj.; New schedule set for discovery; Filing motions 9/16/75; Government's response, 9/19/75; Argument of motions - 9/23/75
15	Filed Defendants' notice of motion for a hearing, etc.. Inspection of

DATE 1975	PROCEEDINGS
Sept. 15	the Grand Jury minutes, etc., discovery, etc., Bill of Particulars, et ret. 9/23/1975- Magistrate
Sept. 16	Proceedings before the Magistrate - Motions have been filed Govt. to respond by 9-19-75 and argument on 9-23-75
Sept. 23	Proceedings before the Magistrate Mr. Blatnik (Mr. Potenza's office) appeared for defendants. Government's responses are being filed today. Argument of motions rescheduled Sept. 30, 1975, 10:30
Oct. 1	Filed Govt's response to defts' pre-trial discovery motions.
Oct. 2	Argument on motions - granted in part; denied in part. Discovery is
Oct. 9	Case Transferred to Judge Elfvin
Oct. 20	Filed Government's supplemental response to defendant's pre-trial motion
Oct. 20	Filed Govt's motion to move action for trial
Nov. 3	Case set for trial on January 13, 1976
1976	
Mar. 15	Set Date For Trial - Case set for trial 5/4/76
May 4	Jury is selected by not sworn. Court advised jury they will be notified when to appear to start trial
May 13	Filed subpoena - Chester, Shear served 5/7/76
May 13	Govt. moves case to trial before Judge Elfvin and Jury, at Buffalo, N.Y. adj. from 5/4/76; Trial adj. to 5/14/76
May 14	Trial continues with same appearances and jury; Court denies Deft's motions to dismiss. Jury retires to deliberate upon their verdict. Jury returns a verdict of guilty against Both Defts.; Jury is discharged.; Bail is continued; Sentencing set for 6/14/76
June 14	Deft. Reynolds is sentenced to the custody of the Attorney General for a period of Ten (10) Years with a mandatory Three (3) Years of parole to follow--Elfvin, J.
June 14	Deft. Jackson is sentenced to the custody of the Attorney General for a period of Five (5) Years with a mandatory Three (3) Years to follow--Elfvin, J.
June 16	Filed Notice of appeal for both defendants
June 18	Defts. (cy) notice of appeal, with form A, cy. of docket entries mailed to the CCA; Cy. of notice of appeal also mailed to U.S. Atty., and defts.
June 21	Filed J & C for both defts. execution issued.
June 25	Filed Ct. Steno's transcript of excerpts from the trial before Judge Elfvin and a Jury, commencing on 5/4/76 at Buffalo, N.Y.
June 28	Filed Ct. stenographer's transcript of proceedings taken on 6/14/76
June 28	Filed scheduling order from the CCA - record to be docketed to the CCA by 7/16/76; Cy. of the transcript shall be filed by 7/16/76
July 19	Filed marshal's return of J & C for deft. Jackson. Deft. to USP, Lewisburg, PA.
July 23	Filed certified cy. of J & C for Jerome Reynolds, with Marshal's ret. of execution to the U.S. Penitentiary at Atlanta, Georgia on 7/15/76

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

JEROME REYNOLDS and
MELVIN JACKSON

MARCH 1975 SESSION ~~Term~~
(Impaneled May 27, 1975)

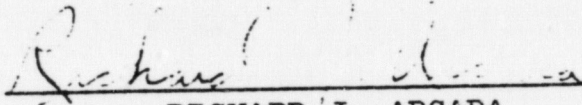
No. *Cr 75-175*

Vio. T. 21, U.S.C.,
Sect. 841(a)(1)

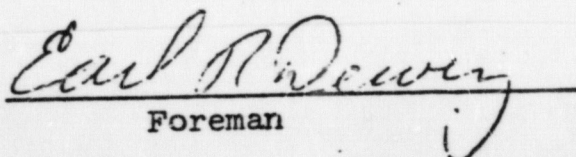
COUNT I

The Grand Jury charges:

On or about the 10th day of July, 1975, in the Western District of New York, the defendants, JEROME REYNOLDS and MELVIN JACKSON, did, knowingly, intentionally and unlawfully possess with the intent to distribute approximately 10.67 grams gross weight of a substance containing heroin, a Schedule I controlled substance as set forth in Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1).


RICHARD J. ARCARA
United States Attorney

A TRUE BILL:


Foreman

Form DJ-195
(Ed. 2-7-66)

No. _____

UNITED STATES DISTRICT COURT

WESTERN District of NEW YORK

Division

THE UNITED STATES OF AMERICA

vs.

JEROME REYNOLDS and
MELVIN JACKSON

INDICTMENT

A true bill,

[Signature]
Foreman.

Filed in open court this 30th day
of July, A. D. 1975

Clerk.

Bail, \$ _____

United States of America vs.

United States District Court for

DEFENDANT

JEROME REYNOLDS

WESTERN DISTRICT OF NEW YORK

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

40380-133

MONTH DAY YEAR

June 14, 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Rocco Potenza

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being ~~of~~ verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of **did knowingly, intentionally and unlawfully possess with intent to distribute a substance containing heroin, a Schedule I Controlled Substance, in vio. Titel 21, U.S.C., Section 841(a)(1)**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

sentenced to the custody of the Attorney General for a period of ten (10) years with a mandatory three (3) years of parole to follow.

SPECIAL
CONDITIONS
OF
PROBATION

NY State of New York

June 14, 1976

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for violation occurring during the probation period.

RECEIVED U.S. MARSHAL
JUN 21 12 12 PM '76
W.D.N.Y. BUFFALO, N.Y.

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends, *RECOMMENDATION*

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

JOHN T. ELFVIN

JOHN T. ELFVIN, U. S. District Judge
June 14, 1976

CERTIFIED AS A TRUE COPY ON

THIS DATE

June 18, 1976
BY *Susan Schlicht*
() CLERK
☒ DEPUTY

I partially executed **MARSHAL RETURN**
 SUBJECT **JEROME REYNOLDS** FROM THE MONROE CO Jail
 ROCH N.Y. 6-8-76 TO U.S. PEN LAWISBURG PA
 FOR FURTHER REMOVAL.

R.S. KING
 by John A. Dusen

158822

**GENERAL
 CONDITIONS
 OF
 PROBATION**

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT - You shall:**

- (1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work notify your probation officer at once, and consult him prior to job changes;
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any change in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on June 14, 1976 to Erie Co H C Buffalo, NY

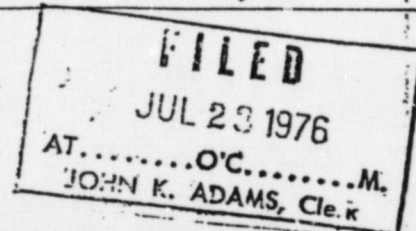
Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on 15 July 76 to United States Penitentiary



at Atlanta, Georgia, the institution designated by
 the Attorney General, with a certified copy of the within Judgment and Commitment.

John J. Beards
 United States Marshal.
 By Edward S. Stein *ms*
 Deputy Marshal.

JOHN J. BEARDS

JOHN J. BEARDS, U. S. MARSHAL

United States of America vs.

United States District Court for

DEFENDANT

MELVIN JACKSON

WESTERN DISTRICT OF NEW YORK

DOCKET NO. Cr-1975-175

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
June	14	1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Michael Blotnik

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☒ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of **did knowingly, intentionally and unlawfully possess with intent to distribute a substance containing heroin, a Schedule I Controlled Substance, in vio. Title 21, U.S.C., Section 841(a)(1)**

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

sentenced to the custody of the Attorney General for a period of five (5) years with a mandatory three (3) years to parole to follow.

SPECIAL
CONDITIONS
OF
PROBATION

Erie Co N.Y.C. Buffalo, N.Y.

June 14, 1976

ADDITIONAL
CONDITIONS
OF

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FILED
JUN 19 8 30 AM
U.S. DISTRICT COURT
W.D. OF N.Y.

RECEIVED U.S. MARSHAL
JUN 21 12 13 PM '76
W.D.N.Y. BUFFALO, N.Y.

ADDITIONAL
CONDITIONS
OF
PROBATION

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COMMITMENT
COMMEN-
CATION

The court orders commitment to the custody of the Attorney General and recommends, A

LEWISBURG

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

JOHN T. ELFVIN

SIGNED BY

☐ U.S. District Judge

☐ U.S. Magistrate

JOHN T. ELFVIN

JOHN T. ELFVIN, U. S. District Judge

June 14, 1976

CERTIFIED AS A TRUE COPY ON

THIS DATE

June 18, 1976

BY

() CLERK
() DEPUTY

**GENERAL
CONDITIONS
OF
PROBATION**

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT - You shall:**

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- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability (When out of work notify your probation officer at once, and consult him prior to job changes);
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any change in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on June 14, 1976 to Erie Co H.C. Buffalo, N.Y.

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on 7-8-76 to UNITED STATES PENITENTIARY

SPECIAL
CONDITIONS
OF
PROBATION

SPECIAL
CONDITIONS
OF
PROBATION

SPECIAL
CONDITIONS
OF
PROBATION

at LEWISBURG, PA., the institution designated by
the Attorney General, with a certified copy of the within Judgment and Commitment.

Edward S. King

United States Marshal.

By

John H. Lonier

Deputy Marshal.

WITNESSES

NOTARY PUBLIC

1 Q. You weighed it first. I presume after opening --
2 breaking the seal, you would weigh the contents of
3 the smaller baggies within that bag?

4 A. Yes, that is correct.

5 Q. Did you also weigh the contents of the smaller baggies
6 after you took them out of that particular bag?

7 A. I can tell you what I did, because we are talking
8 about several packages, right? I found this plastic
9 bag to contain these bundles and, naturally, I'm not
10 interested in the weight of the plastic bag, I am
11 interested in the weight of the powder in the little
12 bundles. I weighed maybe two or three of the
13 envelopes themselves and took an average.

14 Q. In other words, you didn't --

15 A. Weigh each bag? No.

16 Q. You did not weigh each little glassene bag nor did you
17 weigh them all together?

18 A. I weighed them all together, yes.

19 Q. In the bag?

20 A. Yes, with the powder in the bag.

21 Q. Now, did you take -- did you test -- your samples
22 that you tested, did that have some from each one
23 of those little baggies?

24 A. I didn't do each and every sample on the screen. I
25 did fifteen, if I recall.

1 Q. Fifteen out of the thirty-five or so little glassene
2 bags?

3 A. Right. My report indicates that.

4 Q. Now, did you do fifteen individual tests on each
5 sample that you took out of one of those glassene
6 bags?

7 A. The screening test, the original marquis and nitric
8 acid, furfural.

9 Q. Which turned out negative?

10 A. It told me one thing. You say they are negative --

11 Q. Which gave you results that were not indicative that
12 heroin was in fact present?

13 A. At that point I am not looking for heroin in partic-
14 ular, I am screening them to see if there is a
15 possibility that heroin might be there, and the
16 mere fact that I did not get a conclusive test at
17 that point, I would not say that is negative.

18 Q. Thank you, Mr. Griffith. Now, you tested fifteen
19 of those little glassene bags individually, is that
20 correct?

21 A. Right, my initial screening.

22 Q. Your conclusive test that you performed, did you
23 perform those fifteen times?

24 A. No. My next step was to go and take eight of that
25 fifteen and proceed, and I found them to give me

1 what I was looking for, they all were the same.

2 Q. Did you test -- the eight that you took out of the
3 fifteen that you had, did you perform the chromoto-
4 graphy test on all eight of them?

5 A. No, sir, a composite was made from these eight.

6 Q. In other words, you took a little bit of each one
7 of the eight samples and put it into one sample and
8 tested that?

9 A. That is right. That is where the vial comes in.

10 Q. So you could not conclusively say that each one of
11 those baggies contain heroin, could you?

12 A. Definitely not.

13 Q. Can you tell how many?

14 A. I can say the ones that I used possibly might have
15 all contained heroin.

16 Q. Might?

17 A. Yes. I didn't do each and every bag. It would use
18 up all the evidence if I went through.

19 Q. Thank you. Now, after you performed the tests on
20 all these different samples that you had taken from
21 the original sample that was delivered to you -- the
22 original package that was delivered to you -- you
23 resealed all the evidence, is that correct, or you
24 weighed it again and then resealed it?

25 A. Reweighed it. I didn't reseal the envelopes, I just

1 PROCEEDINGS OF MAY 14, 1976, COMMENCING AT 9:05 A.M.

2
3 (Defendants absent, jury absent,
4 counsel present.)
5

6 THE COURT:

Mr. Mellenger, I have noted the
7 absence of the defendants. We think that
8 due to an inadvertence, a misconstruing
9 by them of my instructions on time, where
10 I had indicated we would be here for this
11 purpose, namely, the defendants' motions
12 at this hour, and that the jury would
13 return at nine-thirty, they may have picked
14 up the latter instruction. Mr. Blotnik,
15 is it satisfactory to you that we proceed
16 with the defendants' motions without the
17 defendants being here?

18 MR. BLOTNIK:

Yes, your Honor.

19 THE COURT:

All right.

20 MR. BLOTNIK:

There are a number of motions I would
21 like to make, your Honor. First of all,
22 I would like to make a motion for a dismissal
23 of the case for failure to establish a
24 prima facie case. My main objection is
25 that the prosecution has failed to establish

1 a continuous chain of custody of the
2 controlled substance in question. I am
3 aware that the cases indicate that it is
4 sufficient if the arresting officer, who
5 had initial custody of the contraband,
6 seals it and mails it by registered mail
7 to the technician, and the technician
8 testifies to the same effect that he
9 received the material in the sealed
10 envelope, and so forth, that that is
11 sufficient. However, the cases indicate
12 that the agent, as well as the chemist,
13 would have to testify as to the normal
14 office procedure within their particular
15 offices, as to what their routine is as
16 regards handling of the contraband. Now,
17 in both cases, as relates to both witnesses
18 in this case, the arresting officer, Agent
19 Peterson, testified that he had no knowledge
20 as to what the particular procedure in the
21 office was. As a matter of fact, he testified
22 that several -- almost any agent in the
23 office would have access to the evidence in
24 the evidence vault once the vault was opened
25 by one of the technicians, only two of whom

1 had the combination to the vault." He
2 testified at times he went and retrieved --

3 THE COURT: This is one of the defendants, is it
4 not, Mr. Jackson?

5 MR. JACKSON: Yes.

6 THE COURT: Let the record reflect that Mr. Jackson
7 has now come into the courtroom. Go ahead.

8 MR. BLOTNIK: And Agent Peterson testified that he
9 didn't know if there was any receipts, if
10 there was any log book kept in which entries
11 were made in a chronological or any other
12 manner indicating the retrieving or placing
13 of evidence in the vault. He subsequently
14 in the afternoon came back and said he
15 thought --

16 THE COURT: Also Mr. Reynolds is in the courtroom.

17 MR. BLOTNIK: In the afternoon he had thoughts about
18 what I asked him earlier that morning, and
19 he informed me the receipts were sometimes
20 made, however, they were destroyed, there
21 was no evidence kept of them. In summary,
22 my opinion is that he really didn't know
23 the proper procedure in the office. The
24 same went as far as the chemist was concerned.
25 He said he was totally ignorant as to what

1 occurred in the office, other than from the
2 time that he received the sample until the
3 time he gave it back to the vault technician,
4 and on that basis, I think the chain of
5 custody has not been established, and I
6 think that the People's case should be
7 dismissed, the chain of custody being a
8 material element to the prima facie case.

9 THE COURT: As to that aspect, is there any case
10 that you have that requires a showing of
11 a knowledge of office practice where there
12 is some hiatus in the chain of custody?

13 MR. BLOTNIK: Yes, your Honor. The case is United
14 States versus Christopher, it is a Court
15 of Appeals case, not the Second Circuit,
16 it is a 1973 case, and the citation is
17 488 Fed. 2nd 849, your Honor.

18 THE COURT: All right.

19 MR. BLOTNIK: My second motion is addressed to the
20 evidence that was introduced. I move that
21 all packets that are within Government's
22 Exhibit 1 that haven't been tested be
23 excluded from the evidence for the simple
24 reason that we do not know what is in them.
25 The chemist testified that he took fifteen

1 bags only out of that sample of, I think,
2 thirty-seven or thirty-six in there, I
3 did not have an opportunity to count them,
4 and he did not test the remaining packets.
5 Inasmuch as they were not tested, we do
6 not know what is in them, and they cannot
7 possible be introduced as evidence of heroin,
8 as alleged by the People.

9 THE COURT: How do we know which ones were tested?

10 MR. BLOTNIK: That is my next point, your Honor. We
11 do not know what fifteen were tested. Inas-
12 much as we do not know which ones were tested,
13 I would move that the whole exhibit be ex-
14 cluded. The chemist testified at least one
15 bag maybe -- he said all he could conclude
16 was one bag had heroin in it, one of those
17 little glassene bags. He could not testify
18 how many more had heroin in it because he
19 didn't know. He testified there was evid-
20 ence of heroin in at least one. On that
21 basis, I would move that that evidence be
22 excluded, your Honor. I specifically asked
23 the chemist yesterday, and he said he took
24 at random fifteen, and the fifteen bags
25 that he took out he merely screen tested,

1 and he, himself, testified that none of the
2 screening tests, the color tests, were con-
3 clusive as to the presence of any heroin.
4 He said out of fifteen in the reverse
5 pyramid or in the pyramid fashion, he only
6 extracted eight out of the fifteen, and the
7 eight -- he took samples out of each of the
8 eight glassene bags and tested them as one
9 group. That was the gas chromatography
10 test that he claimed turned up positive.
11 Inasmuch as we do not know which ones, if
12 any, at least -- in his opinion, at least
13 one of them would have sufficient evidence
14 of heroin, but we do not know which. So
15 I ask that the rest of them be removed.
16 If your Honor needs it, there is a case
17 that states that any packages that are not
18 initialed, and in this case Officer Peterson
19 at random initialed only about six or seven,
20 those should be thrown out as well. The
21 case supporting that proposition is United
22 States versus Carlyle, 488 Fed. 2nd 869,
23 a 1973 case.

24 THE COURT: That is a popular volume.

25 MR. BLOTNIK: I beg your pardon?

1 THE COURT: 488 Fed. 2nd is a popular volume.

2 MR. BLOTNIK: It seems to be. I didn't notice it
3 until just now, your Honor. That will conclude
4 my motions on behalf of the defendants at
5 the present time.

6 THE COURT: Mr. Mellenger?

7 MR. MELLENGER: Yes. I would like to make a few
8 brief comments on the defendants' motions.
9 The first motion for failure to show a
10 prima facie case on the basis that Agent
11 Peterson could not testify as to the custody
12 requirements of his office, I believe Agent
13 Peterson did testify that there's only two
14 people who had access to the evidence vault,
15 that would be Michael Burke and Agent
16 Trincelito, and that if accompanied by one
17 of those two custodians, another agent
18 could go into the vault, but only for a
19 specific purpose, and that would be to
20 take out evidence which he specifically had
21 an interest in, such as having seized him-
22 self. I think the defense is inferring
23 that any agent could walk in and out of
24 that vault at any time and grab any package
25 that was laying there. There was supervision

1 and control of this evidence, and another
2 thing I would like to point out to the Court,
3 as to the custody of this evidence, this
4 evidence was only in the vault for a period
5 of twenty-four hours or approximately one
6 day. Agent Peterson testified that he placed
7 the evidence in the vault after sealing it
8 in the evidence bag, and the next day he went
9 in and mailed it to the Northeast Regional
10 Laboratory.

11 THE COURT: That is only one day at the outset
12 of the case, and evidently about a week or
13 more, more recently.

14 MR. MELLENGER: This week.

15 THE COURT: Wasn't it returned from New York about
16 a week ago?

17 MR. MELLENGER: Well, I submit to the Court that up
18 until the time that evidence is tested and
19 found to contain heroin, what happens to it
20 after that is not important.

21 THE COURT: All right.

22 MR. MELLENGER: Agent Peterson did testify that he
23 sealed that in the envelope, evidence bag,
24 and Mr. Griffith came in and testified that
25 when he received that evidence bag, the seal

1 was intact. There was no indication of any
2 tampering with that bag, which indicates
3 that that was the same evidence which Agent
4 Peterson sealed in that bag, and which Mr.
5 Griffith removed from the bag. So --

6 THE COURT: Are you familiar with the Christopher
7 case? I am not.

8 MR. MELLENGER: I am not either, your Honor.

9 THE COURT: All right.

10 MR. MELLENGER: Also the defense made mention of the
11 fact that there was logs kept, receipts
12 kept, and Agent Peterson wasn't familiar
13 with these. He said he knew they were kept,
14 but he was not the person who kept them.

15 THE COURT: He was not sure whether they were
16 being kept at that time.

17 MR. MELLENGER: That is correct. As to the second
18 position that all packets not tested should
19 be removed from Government's Exhibit 1, there
20 is more than sufficient evidence to indicate
21 that all these packets contained heroin.

22 THE COURT: How is that?

23 MR. MELLENGER: The main purpose of this meeting at
24 the South Park Botanical Garden was so that
25 the defendant could sell heroin to Agent

1 Peterson. There is, in effect; an admission
2 on their part that this was heroin, that was
3 what they were purporting to sell, and that
4 is what they did hand over to Agent Peterson.

5 THE COURT: That wouldn't suffice if they were saying
6 they were selling heroin and instead were
7 indulging in a ripoff and handing over
8 packages of merely lactose.

9 MR. MELLENGER: That is correct. However, the sub-
10 stance was tested, and Agent Peterson said
11 that he performed a field test which gave
12 him an indication that it was heroin. It
13 was taken down to the laboratory --

14 THE COURT: He only tested two bags.

15 MR. MELLENGER: Yes, that is correct, your Honor, some
16 of the bags. This was taken down to the
17 laboratory and a sample of the stuff was
18 tested and it was found to be heroin, and I
19 think since it was found to be heroin in
20 portions of Government's Exhibit 1, and
21 that the defendants were purporting to sell
22 heroin, there is sufficient proof to show
23 that all the bundles contained heroin, plus
24 the fact that I think it should go to the
25 jury as to -- the exhibits should go to the

1 jury to examine them and determine whether --

2 THE COURT: How can they examine them?

3 MR. MELLENGER: As to the color of the powder.

4 THE COURT: How would they know anything about
5 that?

6 MR. MELLENGER: Well, there are certain visual tests.

7 THE COURT: We haven't educated them to the point
8 of their being able to look at it and say
9 this contains heroin.

10 MR. MELLENGER: They could find that one packet of --
11 heroin is contained in part of the bundle
12 and all the powder and the packets look alike,
13 they could infer the rest is heroin, along
14 with the other evidence that the defendants
15 were purporting to sell heroin. I think
16 there is sufficient evidence in the case
17 to let Government's Exhibit 1 go to the jury
18 in its totality.

19 THE COURT: What if Government's Exhibit 1 were
20 not in evidence, would that do anything
21 to your case?

22 MR. MELLENGER: Your Honor, I feel there would still
23 be proof that the defendants possessed
24 heroin with the intent to distribute it.
25 There is not a requirement that the Government

1 prove an exact amount, just a substantial
2 amount.

3 THE COURT: What is a substantial amount?

4 MR. MELLENGER: It would have to be more than a minute
5 amount.

6 THE COURT: Do you have any cases on that?

7 MR. MELLENGER: No, your Honor. I think, your Honor,
8 it would be sufficient to show one packet
9 contained heroin and they were possessing
10 a sufficient amount in order to violate the
11 statute, that they were possessing heroin
12 with the intent to distribute.

13 THE COURT: You say you have no authorities on
14 the amount?

15 MR. MELLENGER: Not at this point, your Honor, but
16 just by the mere fact that the defendants
17 were there for the purpose of selling heroin,
18 they handed the package over in its totality
19 as heroin to Agent Peterson, there has been
20 a test performed which showed a portion of
21 those packages contained heroin, I think
22 there is sufficient evidence for this package
23 to go to the jury in its totality.

24 THE COURT: All right. Anything further, gentlemen?

25 MR. MELLENGER: Yes. As to the other motion that the

1 package should be excluded because each and
2 every one of those packages were not initialed
3 by Agent Peterson, they were handed over to
4 him in five bundles with rubber bands around
5 them, and he treated those bundles as an
6 individual package, and he initialed each
7 bundle, he testified he treated those
8 bundles separately and --

9 THE COURT: You are talking about Agent Peterson?

10 MR. MELLENGER: Yes. He took special care not to co-
11 mingle the packets from the various bundles.
12 He testified --

13 THE COURT: He weighed them and counted them, and
14 he did take them apart, and he did initial
15 some of the bags. He was careful to put
16 them back together in the same order, same
17 bundle, but aside from his field testing,
18 which he did as to two bags, he had no
19 indication that it was or was not heroin or
20 was or was not a substance containing heroin.

21 MR. MELLENGER: Mr. Blotnik brought up the point that
22 each one of the packages should be initialed.

23 THE COURT: His point, I think, is directed to
24 the chemical analysis made by Mr. Griffith.
25 Mr. Griffith indicated that he had certain

1 screening tests of fifteen of the bags,
2 of a substance from fifteen of the bags,
3 and that test, while it gave some indication
4 of heroin being present or the possibility
5 of heroin being present, it was not definitive,
6 and then he selected from the fifteen, eight
7 bags, and out of those eight bags he took a
8 quantity from each and made a composite
9 sample, and he subjected that composite
10 sample to tests which definitively showed
11 that in that composite sample there was
12 heroin. Mr. Griffith says that he knows
13 that somewhere among eight bags was heroin,
14 but he never said which bags. Is that
15 important?

16 MR. MELLENGER: I thought Mr. Blotnik was saying
17 that any package that wasn't personally
18 initialed by Agent Peterson should be --

19 THE COURT: Well, I think his first part went
20 both to the identification by Peterson, and
21 more particularly, as I understand it, to
22 the fact that Mr. Griffith, himself, had
23 only tested fifteen, so that the remaining
24 quantity would go out. Did I properly
25 understand that?

1 MR. BLOTNIK: That is correct, your Honor.

2 MR. MELLENGER: Your Honor, as indicated before, the
3 fact that the defendants were there for the
4 purpose of selling the heroin, the fact the
5 package was -- part of the package was found
6 to contain some heroin, should not affect
7 the admissibility of Government's Exhibit
8 1, it should go to the jury.

9 THE COURT: All right. Now, getting back to the
10 other question, what happens to the Govern-
11 ment's case if Government's Exhibit 1 is
12 not "in evidence"?

13 MR. MELLENGER: I'm not positive at this time, your
14 Honor. It would seem to me that even if
15 Government's Exhibit 1 were not in evidence,
16 you would still have a prima facie case, in
17 that we have shown an unbroken chain of
18 custody from the point that Government's
19 Exhibit 1 was taken from the defendants
20 until the time it was analyzed to be heroin.
21 But I am still stressing that the Government
22 has moved it into evidence, it has been
23 admitted, it should go to the jury. Whatever
24 point Mr. Blotnik has brought out should go
25 to the weight and not the admissibility of

1 that exhibit.

2 THE COURT: What do you view the effect will be
3 if Government's Exhibit 1 is removed from
4 evidence, as such?

5 MR. BLOTNIK: Your Honor, first of all, the crime
6 charged is intent to distribute --

7 THE COURT: Possession with intent to distribute.

8 MR. BLOTNIK: That is correct. In the event that
9 the exhibit is excluded, they certainly
10 couldn't come to any conclusion that there
11 was an intent to distribute, inasmuch as
12 a substantial amount, as Mr. Mellenger has
13 indicated, is necessary in order to convict
14 of that particular offense. Inasmuch as
15 we do not know what is in those packets,
16 I can't possible see under what --

17 THE COURT: Now, you are going back to the con-
18 tention that the case has not been proved.
19 I am asking a narrow question. What, if
20 any, effect is there on the case if the
21 exhibit itself is not in evidence? Suppose
22 the Government had never moved Exhibit 1
23 in evidence.

24 MR. BLOTNIK: I think it is part of the prima facie
25 case to prove there was some heroin exchanged,

1 otherwise a different charge should have
2 been brought.

3 THE COURT: There must be evidence that what was
4 procured from Jackson and Reynolds did
5 contain heroin.

6 MR. BLOTNIK: That is correct, your Honor.

7 THE COURT: As to whether they could be proved
8 without the package itself going in evidence.

9 MR. BLOTNIK: It is a question for the jury, a
10 question of fact as to whether they believe
11 the expert that testified here.

12 THE COURT: I agree.

13 MR. BLOTNIK: All he testified is that there was
14 some trace --

15 THE COURT: Now we are back to the more broad
16 question as to which your motion is directed.
17 I am going to deal with it. I am asking that
18 narrow question, what if the Government never
19 offered Government's Exhibit 1 in evidence?

20 MR. BLOTNIK: I think it would directly bear on
21 the charge of intent to distribute. In
22 other words, I think it would be prejudicial
23 if the jury were to be under the impression
24 that this large number of bags was heroin,
25 which it isn't, at least it hasn't been

1 proven.

2 THE COURT: All right. I will take a little recess
3 and make up my mind.

4 MR. MELLENGER: Your Honor, may I say one more thing?
5 This exhibit has already been offered in
6 evidence and accepted.

7 THE COURT: I understand it has, but I may take it
8 out of evidence. I am wondering, technically,
9 what would happen if it were not in evidence,
10 is it necessary to the Government's case
11 that the envelope and the heroin be in
12 evidence, so the jury can fondle it and
13 look at it. I don't really think that it
14 is, but I don't know. We will take a brief
15 recess.

16 (Thereupon the court was in recess
17 at 9:30 A.M.)

18 (Proceedings resumed, pursuant to
19 recess, commencing at 10:05 A.M.)

20 (Defendants present, counsel present,
21 jury absent.)

22 THE COURT: All right. I have given attention to
23 the motions made by you, Mr. Blotnik, and
24 to the cases that you have cited. It is
25 my ruling that the Government is not called

1 upon to make the showing of continuous
2 chain of possession or, in lieu thereof,
3 a showing of a knowledge of office practice,
4 but what is essential is that there be
5 reliable evidence that what was tested, and
6 in this case what is in evidence as Govern-
7 ment's Exhibit 1, actually was or actually
8 contains that other envelope and those other
9 packages and substances which was obtained,
10 according to the testimony of Mr. Peterson,
11 from Mr. Reynolds on July 10, 1975, and if
12 the jury is satisfied that that is so, that
13 the packages which Mr. Griffith tested, and
14 from which he was able to say that it was
15 definitively was heroin contained therein,
16 is the same package that Mr. Peterson obtained
17 from Mr. Reynolds, that would be sufficient.
18 Now, on the other point, as far as the
19 taking out of evidence or putting aside
20 from the consideration of the jury those
21 bags as to which there is no indication
22 which contained the heroin, which Mr.
23 Griffith testified that he was able to say
24 definitively was present when he dealt
25 with the composite sample, there is no need

1 to show that there was heroin present in
2 every bag. The evidence does reliably
3 show that in one bag, and we don't know
4 which among the thirty-four or so which
5 were contained in the baggie bag, which
6 Mr. Peterson said he got from Mr. Reynolds
7 on that date, did contain heroin. We do
8 not know which bag, but it is not important.
9 We have a quantity of substance which is
10 contained in a quantity of envelopes, of
11 bags, and it is sufficient for the Government's
12 case if there be shown to have been a
13 measurable amount, an amount which does
14 enable the chemist to say definitively that
15 there was heroin present among those various
16 bags. So I am denying both of the defense
17 motions. Now, I get back to my narrow
18 question, and I see no reason to upset the
19 admission of Government's Exhibit 1 in
20 evidence, and I will allow it to remain
21 in evidence. At the proper time I will
22 take under consideration any motion that
23 the defense wants to make as to whether or
24 not Government's Exhibit 1 should be allowed
25 to go into the jury room. I will deal with

1 that separately, if the defense makes it.
2 So the defense motions are denied.

3 MR. BLOTNIK: Your Honor, should the defense make
4 the motion regarding the exhibit at the
5 present time or --

6 THE COURT: No, make it at the appropriate time,
7 which would be just before submission to the
8 jury. All right, the Government having rested,
9 what about the defense?

10 MR. BLOTNIK: The defense will present no witnesses.

11 THE COURT: So the defense also is resting and
12 technically, I assume, renews the two motions
13 made at the end of the Government's case?

14 MR. BLOTNIK: Yes, your Honor.

15 THE COURT: You have no further motions to make at
16 this time, and my ruling, of course, is the
17 same.

18 MR. BLOTNIK: If I may just add one other thing?
19 Government's Exhibit 1 was admitted and
20 accepted as evidence of heroin, and there
21 has been no testimony, other than the fact
22 that there is some heroin in it, the substance
23 contained therein is heroin, and under that
24 proposition, I would request that it be
25 excluded again.

1 THE COURT: I am not going to exclude it from
2 being in evidence. Whether we allow it to
3 go to the jury room is a separate question.

4 MR. BLOTNIK: Am I to understand that is in evidence
5 as heroin?

6 THE COURT: Oh, yes. In that package -- if Mr.
7 Griffith's testimony is to be believed --
8 in that package, Government's Exhibit 1,
9 there is heroin.

10 MR. BLOTNIK: I am going to object to that. Thank
11 you, your Honor.

12 THE COURT: Yes. All right, bring up the jury.
13 Now, I have had in the case no requests for
14 instructions from either side. Consequently,
15 I have no necessity to advise either one
16 of you as to my rulings on what I am going
17 to charge or what I am doing on your requests.

18 MR. MELLENGER: Your Honor, I have a request, and I
19 think Mr. Blotnik has one.

20 MR. BLOTNIK: Does the Court request a full instruct-
21 ion or merely the type of instruction?

22 THE COURT: Pardon me?

23 MR. BLOTNIK: Does the Court request a full instruct-
24 ion, written instruction, or merely the type
25 I would wish to be made?

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellees

vs

CERTIFICATE OF SERVICE

Docket No. 76-1321

JEROME REYNOLDS and
MELVIN JACKSON

Defendants-Appellants

I, ROCCO D. POTENZA, attorney for appellants in the above entitled cause, hereby certify that on the 31st day of August 1976 I served the attached Appendix for the Appellants upon the United States Attorney for the Western District of New York, attorney for the Appellee by depositing a copy of same in the United States mails, postpaid, addressed to him at the United States Courthouse Buffalo, New York, his last known address.

ROCCO D. POTENZA
Attorney for Appellants
Office & P.O. Address
1100 Chemical Bank Building
Buffalo, New York 14202

Index No.

UNITED STATES OF AMERICA

Plaintiffs-Appellees

v s

CERTIFICATE OF SERVICE

Docket No. 76-1321

JEROME REYNOLDS

and

MELVIN JACKSON

Defendants-Appellants

Year

ROCCO D. POTENZA

Attorney for

defendants-appellants

Office and Post Office Address
1100 CHEMICAL BANK BLDG.
69 DELAWARE AVE.
BUFFALO, NEW YORK 14202
853 - 5300

Personal Service of the within
hereon endorsed, is admitted this

day of

and of the notice (if any)

19

.....
Attorney(s) for

Sir:—Please take notice

Notice of Entry

that an
within entitled action on the
in the office of the Clerk of the County of

of which the within is a copy, was duly granted in the
day of 19 , and duly entered
on the day of 19

To
Attorney(s) for

STATE OF NEW YORK, COUNTY OF

SS.:

Initial

☐ Certification
by Attorney

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Initial

☐ Attorney's
Affirmation

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

SS.:

Initial

☐ Individual
Verification

he being duly sworn deposes and says that
in this action; that he read the foregoing
and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Initial

☐ Corporate
Verification

being duly sworn, deposes and says that he is the
of
the corporation named in the within entitled action; that he has read the foregoing
and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters he believes it to be true.
Deponent further says that the reason this verification is made by deponent and not by
is because the said
is a corporation and the grounds of deponent's belief as to all matters in the said
not stated upon his own knowledge, are investigations which deponent has caused to be made concerning the subject
matter of this and information acquired by deponent
in the course of his duties as an officer of said corporation and from the books and papers of said corporation.

Sworn to before me, this
day of

19

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Affidavit
of Service
By Mail

is over 18 years of age and resides at

On 19

deponent served the within

upon

attorney(s) for

in this action, at

the address, designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office—official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit
of Personal
Service

On 19

at

deponent served the within

upon

the
herein, by delivering a true copy thereof to him personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

☐ Description

The person served would be described as approximately years of age lbs. ft. in.
male female hair skin eyes other

Sworn to before me, this
day of

19